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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1633

ANHEUSER–BUSCH, INC.,
Petitioner,

v.

TEAMSTERS LOCAL NO. 633,
NATIONAL CONFERENCE OF BREWERY
AND SOFT DRINK WORKERS, SOCRATES MAKRIS,
STEVEN J. McCULLOUGH, FRANK SEBAN,
Respondents.

BRIEF OF AMICUS CURIAE UNITED STATES BREWERS ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE*

The United States Brewers Association, Inc., the oldest incorporated trade association in North America, is an association of brewer members whose production represents over 90 percent of all malt beverages manufactured in the United States. The Association membership

*This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

also includes the major suppliers of the brewing industry, such as bottle and can manufacturers, maltsters and manufacturers of brewery equipment and machinery.

This brief *amicus curiae* supports the position of the petitioner urging the Court to review the decision of the Court of Appeals for the First Circuit. The interest of the *amicus* is predicated upon the far-reaching significance of this case which will profoundly affect the continuing validity of the premise that "the basic policy of national labor legislation (is) to promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95.105 (1962). That precept will be dangerously eroded if the Court permits the decision below to stand. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), allows injunctive relief when a union engages in concerted interference with operations in direct abrogation of its no-strike commitment pending arbitration of a contractually-authorized work rule.

The importance or the intrinsic significance of the work rule that gave rise to the dispute is not an issue in this litigation. The Court of Appeals' droll comment that "(t)his tempest has been brewed in a very small teapot" is a facile but misleading characterization of the real issue submitted to it for decision. The present case will determine whether, pending the outcome of the arbitration process, management will retain the right to effectively direct the manner in which production will be carried out in its plant. In fact, the Court of Appeals' opinion has turned the "teapot" into a "Pandora's box" which has the potential of severely disrupting the constructive evolution of the nation's labor relations policy.

For this reason the case is a critical one warranting a presentation of our Association's view.

I. National Labor Policy Recognizes that Management Has and Must Retain the Right to Establish and to Enforce Reasonable Plant Rules Not Inconsistent with the Law or the Collective Bargaining Agreement.

Management has the fundamental responsibility of running its business efficiently and profitably. The consequences of unprofitable and inefficient operations are fatal to the economic interest of both management and labor. The right to manage includes the corollary prerogative to establish reasonable plant rules not inconsistent with law or the collective bargaining agreement. In *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), the Court expressed the modern view of management's rights with respect to the collective bargaining agreement:

> "Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. *Id.* at 583; Cf. *Local 1098, Street, Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines*, 48 CCH LC ¶18,633 (D.D.C. 1963).

Similarly, arbitrators have consistently held that Management retains all named rights of management not given direct or ceded by the terms of the Collective Bargaining Agreement. *Owens-Illinois Inc.*, 70-2 CCH - ARB ¶8606 (Stouffer, Arb. 1970). If managements right to manage is unenforceable, then that right may as well not exist.

All collective bargaining agreements of our brewer members contain broad "no strike" clauses and equally broad "grievance-arbitration" procedures similar to those at issue in this case. That is, the employer is obligated to arbitrate in return for union's promise not to strike or otherwise disrupt production. *Local 174, Teamsters v. Lucas Flour Co., supra.* These provisions are intended to ensure that production continues even when an employee is given an order he feels is unfair, discriminatory, or in violation of the agreement. The employee may challenge the employer's order through the grievance procedure established by the collective bargaining agreement, but not through self-help. By agreement, it is the arbitrator, not the employee, who is to determine the contractual validity of the employer's order or rule. Pending arbitration, the employee must obey the order or rule unless it presents an objective threat to his health or safety.[1] *Cf. Gateway Coal v. United Mine Workers,* 414 U.S. 368 (1974).

The continuing application of this principle has recently been illustrated in circumstances similar to those presently before the Court. An employer unilaterally posted a work rule requiring employees to wear white tee shirts under their uniform shirts during the summer, and the employees responded by refusing to obey rather than by filing a grievance. The arbitrator upheld disciplinary suspensions, saying:

[1]The pleadings and court decisions in this controversy have shown no such threat to an employee's health or safety.

> "The grievant's self-help response to the work rule was not justified by any threat to his health or safety, and cannot be condoned. While the work rule must itself fail as being unreasonably overbroad, the insubordination of the grievant prevents his recovery of the wages lost." *City of Janesville*, 64 LA 783, 787 (Schurke, Arbitrator)

Arbitration in the brewing industry, as in others, is hardly immediate. It is not uncommon for three months or more to elapse between the time a grievance is filed and the arbitrator's final decision. If an employee is permitted to ignore an order or rule pending arbitration, management's right to direct its enterprise will be frustrated for several months. The prejudicial effects of the delay in implementing a work rule may be compounded by the fact that the employer's need for the work rule may have passed by the time its right to implement it has been approved by an arbitrator. For example, disputes often arise over the question of whether an employer has the right under the collective bargaining agreement to require his employees to work overtime. Under the reasoning of the Court of Appeals' decision, the employees could refuse to accept overtime assignments pending arbitration of the dispute. However, if the employer's interpretation ultimately prevails, he will have lost many days of production to which he was entitled under the contract.

The District Court recognized that Anheuser-Busch's fundamental right to manage was being threatened by the concerted employee disregard of a company work rules pending arbitration, and enjoined this conduct. As the Court noted in *Boys Markets v. Retail Clerks Union, supra,* an injunction was necessary because no other remedy would suffice:

> "Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." *Id.* at 248 (footnote omitted).

If the Court of Appeals' decision is permitted to stand, management will be deprived of the right, which it has not bargained away, to effectively direct the manner in which production will be carried out in its plant.

The decision of the Court of Appeals violates the basic national labor policy that substantive terms and conditions of employment shall be left to private negotiations by effectively incorporating in every collective bargaining agreement a provision that the employer must receive the union's consent before changing a company work rule. Our nation's evolving labor relations law has provided a framework for collective bargaining. The National Labor Relations

Board, under the Taft-Hartley Act, enforces the fundamental right to organize and the duty to bargain. This process has created a body of decisional law which requires employers to negotiate upon mandatory subjects and regulates the manner in which negotiations are conducted. But the NLRB and the courts have continually refused to dictate the substantive provisions of the collective bargaining agreement. See generally, A. Cox, *Law and the National Labor Policy* (1960). In 1947, Congress recognized the temptation for the NLRB to "seek to control more and more of the terms of collective bargaining agreements," and so amended Section 8(d) to provide:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession,*" 29 U.S.C. 158(d). (Emphasis Added) *See* H.R. Rep. No. 245, 80th Cong., 1st Sess., 20 (1947)

Recently the Court reaffirmed the vitality of this provision in *H.K. Porter Co., Inc. v. National Labor Relations Board,* 397 U.S. 99 (1969):

> ". . . [W]e hold that while the Board does have power under the National Labor Relations Act, 61 Stat. 136, as amended, to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any

substantive contractual provision of a collective bargaining agreement." *Id.* at 102.

And yet, the Court of Appeals has in effect imposed upon the employer an obligation to refrain from making and enforcing any work rules pending arbitration in virtually every situation. The vast majority of Brewers and other unionized employers proceed from the assumption that the employer has the reserved right to unilaterally implement changes in the company's work rules. By contract, the union has the right to challenge the reasonableness of the rule or its application through the grievance and arbitration procedure. A provision requiring the employer to obtain the union's consent before changing a company work rule, commonly known as a "status quo" clause, is found in a small minority of collective bargaining agreements. A study by the Bureau of National Affairs disclosed that approximately 2 percent of the contracts surveyed contained provisions that mention changes in the company work rules and required the union's prior consent. Bureau of National Affairs, *Basic Patterns in Union Contracts*, 1975, p. 95:7.

Indeed, in the contract underlying the dispute at issue in this case, the employer and union have agreed to a limited "status quo" clause relating to the discipline of shop stewards. *See,* Collective Bargaining Agreement, Article 5, Section 2. Obviously, this is a subject either party may broach in collective bargaining. If a union seeks the right to require its approval of management's rules before implementation, it should bargain for this right. It should be emphasized that by including a limited "status quo" clause relating to steward discipline, the union recognized a particular

need and through the bargaining process limited management's rights to unilaterally impose discipline with regard to stewards. The effect of the Court of Appeals' decision is to modify the party's agreement by expanding the "status quo" clause from the narrow area of steward discipline to cover virtually all changes in working conditions. This is clearly contrary to the proper role of the judiciary in the collective bargaining process.

The Court must not allow the Court of Appeals decision to circumvent the collective bargaining process and deprive management of its fundamental right to establish reasonable plant rules not inconsistent with the law or the collective bargaining agreement.

II. The Decision of the Court of Appeals Seriously Undermines the Holding of *Boys Markets v. Retail Clerks* and Must Not be Allowed to Stand.

The Court, in a series of decisions starting with *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), through *Boys Markets v. Retail Clerks Union, supra,* and *Gateway Coal Co. v. United Mine Workers, supra,* has achieved and maintained a delicate balance between the interests of management and labor by modifying the type and use of economic weapons available to parties in a labor dispute. The Court in *Boys Markets* recognized that the only practical way to carry out a promise not to strike is not to strike, and the only practical way to enforce the promise is through an injunction. The no-strike clause encompasses

not only formal work stoppages, but also concerted interference with normal operations. The decision of the Court of Appeals circumscribes the Court's holding in *Boys Markets v. Retail Clerks Union, supra,* by restricting use of a court injunction to concerted activity constituting a formal strike – a restriction inconsistent with the Court's opinion in *Boys Markets*:

> "... the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes *without resort to strikes, lockouts, or other self-help measures.* This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate." *Id.* at 249. (Emphasis Added)

There is a serious question whether under the applicable collective bargaining agreement the employer is permitted to initiate a grievance proceeding. Cf. *Ed Friedrick v. I.U.E.*, ____ F.2d ____, 89 LRRM 2847 (5th Cir., 1975). But assuming *arguendo* that an employer may have the right to file a grievance over employee disobedience of a work rule, the necessity for an injunction in cases where employees engage in a concerted refusal to obey a work rule remains. In fact, in *Boys Markets, supra,* access to arbitration procedures was equally available to both sides. *Id.* at 239. It is not clear in that case if the employer took formal steps to initiate grievance proceedings; however, the Court's opinion did not hold or intimate that the availability of the grievance procedure to the employer would be a reason for withholding an injunction.[2] There is no relation

[2]Indeed, some courts considered mutuality of access to the grievance procedure a prerequisite to a *Boys Market* injunction. *Avco Corp. v. Local 787, UAW,* 325 F. Supp. 588 (M.D. Pa. 1971) rev'd 459 F.2d 968 (3d Cir. 1972).

between employer access to the grievance procedure and the propriety of an injunction prohibiting self-help pending arbitration. Even if the employer could and did initiate grievance proceedings, the underlying issue in this case would not be resolved: whether the employees may engage in concerted disobedience of a work rule pending arbitration.

The First Circuit was of the opinion that the closing of the plant was self-inflicted. In fact, the employer had no practical alternative to the course of action it adopted short of suspending the work rule. Arbitrators have held that disciplinary demotions, transfers, withholding of benefits, and forcing public apologies are improper forms of discipline. *See,* e.g., *Thompson Bros. Boat Mfg. Co.,* 55 LA 69, 72-73 (Moberly, Arb., 1970); *Parkside Manor,* 53 LA 411 (Belcher, Arb., 1969); *Celotex Corp.,* 36 LA 517 (Dworkin, Arb., 1961). As the record in this case indicates, warnings proved ineffective and discharge would have been even more severe. Additionally, imposition of the discipline under these circumstances cannot be construed as a lockout. Indeed, the record below is devoid of any contention that management had engaged in a lockout.

It is the position of the United States Brewers Association that the Court of Appeals decision encourages precisely what the Court sought to avoid in *Boys Markets.* If the Court of Appeals decision is permitted to stand, it will subvert the balance created in *Boys Markets,* by rewarding inventive, but equally disruptive, alternatives to a formal strike, and will frustrate the peaceful settlement of labor disputes so carefully pursued by the Court.

CONCLUSION

For the reasons stated herein, as well as for those stated by petitioner, the United States Brewers Association prays the Court to grant the Petition for a Writ of Certiorari and to reverse the decision of the Court below.

Respectfully submitted,

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